Supreme Court, U. S.
FILED
JUL 25 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-44

PAUL A. PEMBERTON,
Petitioner,

vs.

LAWRENCE SPERANDIO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

JOHN C. MILHOLLAND
Box A 302 East Pearl
Harrisonville, Missouri 64701
Telephone 816 884-3218
Attorney for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

QUESTION PRESENTED 1

ARGUMENT—

I Certiorari should be denied under Supreme Court Rule 23(4) because of the material inaccuracy of the petition for certiorari in minimizing petitioner's contacts with the State of Missouri 2

II Petitioner treats the practice of medicine and surgery as an unregulated business in Missouri. It is not. The State of Missouri has expressed its interest in the practice of medicine and surgery and regulates those who may so practice. The cases declaring the elements of minimum contacts in unregulated transactions which are relied upon by petitioner are not persuasive. Petioner has failed to show that the opinion of the Supreme Court of Missouri is contrary to any decision of this Court or to any probable decision of this Court in the future. Certiorari should be denied 9

III Missouri's jurisdiction over the person of petitioner must stand as absolute because of petitioner's voluntary general appearance in the case by his plea for a dismissal of the petition with prejudice. A plea for affirmative relief is a general appearance and waives any defect in personal jurisdiction. Certiorari should be denied 11

CONCLUSION 14

Table of Authorities

CASES

Greenwood v. *Schnake*, 396 S.W.2d 723 (Mo. 1965) 13

McGee v. *International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957) 9

State ex rel. Dennis v. *Snodgrass*, 501 S.W.2d 553 (Mo. App. 1973) 13

State ex rel. Sperandio v. *Clymer*, 563 S.W.2d 88 (Mo. App. 1978) 7

STATUTES

Chapter 334, RSMo. 10

RULES

Rule 23(4), Supreme Court Rules 2, 3, 14

Rule 12, Federal Rules of Civil Procedure 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-44

PAUL A. PEMBERTON,
Petitioner,

vs.

LAWRENCE SPERANDIO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

QUESTION PRESENTED

This is respondent's brief in opposition to the grant of a writ of certiorari upon the asserted ground of petitioner's lack of minimum contacts with the State of Missouri and, as grounds which should preclude the grant of certiorari, urges the affirmative answers to these subquestions:

Should certiorari be denied because:

a. Petitioner has inaccurately failed to disclose in his petition the full extent of his contacts with the State of Missouri, and

b. Because the protection of its citizens in matters of surgical treatment is a matter of state concern upon

which the Legislature of the State of Missouri has enacted governing legislation and the prescription for surgery upon the person of respondent to be performed within Missouri rendered petitioner subject to the jurisdiction of Missouri courts, and

c. Because, in spite of any claimed lack of minimum contacts, petitioner entered a general appearance in the state trial court by invoking the jurisdiction of the trial court to grant affirmative relief to petitioner and thereby effectively waived any claim of lack of personal jurisdiction?

ARGUMENT

I.

Certiorari should be denied under Supreme Court Rule 23(4) because of the material inaccuracy of the petition for certiorari in minimizing petitioner's contacts with the State of Missouri.

Petitioner, Paul A. Pemberton, is sued in two counts for medical malpractice and for active and overt participation in the execution of a conspiracy to fraudulently conceal the result of the malpractice from respondent.

His petition should be denied for its inaccuracy.

Petitioner comes to this Court and, by omission and inaccurate implication, disregards the factual allegations of his participation in a conspiracy whose overt execution and resulting damage occurred in the State of Missouri and thereby suggests that he is charged only with the first count malpractice and only as a result of a mere letter of medical information mailed into the State of Missouri from the State of Utah.

By such omission to recite or consider the facts indicating culpability in the pleaded conspiracy of fraudulent concealment, petitioner falls short of complete candor in his recital of the facts concerning his contacts with the State of Missouri.

The petition for certiorari is based upon your Utah-resident petitioner's sole contention that he did not have sufficient contacts with the State of Missouri to permit Missouri to exercise jurisdiction over his person. Therefore, any proposed review by certiorari necessarily requires an evaluation of the facts relating to petitioner's conduct to determine the narrow factual question of minimum contacts, vel non.

It is paramount that your petitioner shall have been accurate in his factual statement of the case since the resolution of his question tendered for review depends upon weighing the facts.

Supreme Court Rule 23(4) states that inaccuracy will be a sufficient reason for denying the petition:

> "4. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

This petition for certiorari does not bring with it the usual record of a trial below. There has not been a trial. Thus, of necessity, your litigants and this Court must look to the facts pleaded in the petition below and the facts averred in exhibit affidavits appended.

Respondent's two-count petition was dismissed by the trial judge as to petitioner. It was dismissed with prejudice to its refiling against petitioner (A 10). It was ordered

reinstated by the opinion of the Supreme Court of Missouri which recognized the existence and effect of the petition's two counts (A 1):

> "Relator Sperandio charges . . . Paul A. Pemberton . . . and others with medical malpractice *and other tortious conduct.*" Emphasis supplied.

Unaccountably, the petition for certiorari makes no reference to the "other tortious conduct" and, furthermore, its Appendix includes Count I (A 18-25) but omits Count II of the petition so that this Court is left to speculate about the "other tortious conduct." It would seem obvious that the facts of the "other tortious conduct" charged are "essential to a ready and adequate understanding of the points requiring consideration." Surprisingly, however, the reason for petitioner's intentional omission of Count II from the Appendix is stated by petitioner to be (A 15):

"COUNT II

> "(Omitted as not being relevant to the issues raised in this proceeding.),"

and petitioner completely ignores the substance of Count II in his petition for certiorari.

Count II is the basis for the observation of the Supreme Court of Missouri that your petitioner is charged with "other tortious conduct." (A 1). We suggest that its facts are, indeed, relevant.

One of the other defendants (jointly charged with your petitioner with "other tortious conduct" by Count II of the petition below) was also successful in persuading the same trial judge to dismiss the petition as to him. That action of dismissal, also, was countermanded by a final judgment in another original proceeding brought

against the trial judge in the Missouri Court of Appeals. Reference to that collateral proceeding is made by petitioner in the section of his petition for certiorari entitled "Opinions Below" wherein it is referenced as, "The opinion of the Missouri Court of Appeals, Kansas City District, dated June 23, 1977 is not reported and is included as Appendix A, page A6."

The document at page 6 of the Appendix is not the opinion of the Missouri Court of Appeals. It is an alternative writ of mandamus.

The *opinion* of the Missouri Court of Appeals *is* reported. It is a final judgment. It was filed February 6, 1978, rehearing was denied February 27, 1978 and application for transfer to the Supreme Court of Missouri was denied April 10, 1978. It is officially reported at 563 S.W.2d 88 (Mo.App. 1978) and is styled *State ex rel. Sperandio* v. *Clymer*. That final judgment of the Missouri Court of Appeals constitutes the law of the case insofar as it judicially construes Count II of respondent's petition now pending below.

That final judgment judicially declares the validity of the "other tortious conduct" claim pleaded against the defendants to Count II (including your petitioner).

If petitioner were to be accurate in his petition for certiorari, his Questions Presented would be recast to present the question as:

> Where a Utah-resident physician invented a novel and specialized surgical procedure to cut and move part of a shallow hip socket in a child to a proper position over the head of the thigh bone, taking advantage of the plasticity of the cartilage extant between the hip bones in children which does not exist in adults, and

Where he designed a modification of the technique for use in adults which depended upon a controlled fracture to compensate for the lack of the plasticity found in children, and

Where two Missouri-resident surgeons who knew nothing of how to do his surgical procedure sought his consultation by mail for the purposes of 1) his confirming their diagnosis of their Missouri-resident, adult patient's condition and 2) his recommending surgical treatment and 3) his instructing them in its execution which they intended to accomplish within the State of Missouri upon their specific patient, and

Where in response and agreement he undertook to and did diagnose, prescribe, design and illustrate by drawing directly upon the Missouri patient's x-rays the unique surgical operation to be performed within Missouri upon the Missouri patient and mailed those instructions and designs into Missouri for intended use within Missouri, and

Where the directions for surgery unsuccessfully were attempted to be executed within Missouri and resulted in disability of the patient which was followed with a suit by the patient against the two Missouri-resident surgeons, and

Where the Missouri-resident surgeons had represented falsely to their patient that the surgery had placed his hip bones in proper position, and

Where the Utah-resident doctor was not a party to the Missouri litigation but, nevertheless, voluntarily and at the request of the Missouri-resident surgeons participated in its defense by giving his deposition in Utah for the transmission to and for use within

Missouri to influence the determination of the patient's claim adversely and against the patient in the Missouri court and testified falsely in support of the concealments made by the Missouri-resident surgeons that the bones had been successfully placed in proper position while in fact the bones had not been placed in proper position by the surgery,

Does such participation in medical malpractice within Missouri by instruction and such voluntary participation in a conspiracy with Missouri-residents to fraudulently conceal from the patient in Missouri the nature and extent of the damage done the patient in Missouri constitute sufficient contacts with the State of Missouri to subject petitioner to jurisdiction of the Missouri court?

Unfortunately, the question recast in that form cannot be fairly examined here because of the petitioner's intentional omission of all consideration or discussion of Count II and the final judgment relating to Count II in *State ex rel. Sperandio* v. *Clymer,* which is reported officially at 563 S.W.2d 88 (Mo.App. 1978).

If the petition for certiorari were accurate and considered the factual allegations of petitioner's joinder in a conspiracy to commit fraud which was executed within Missouri with resulting damage, it would be clear that petitioner *participated in the commission* of a tort committed within Missouri. See: *State ex rel. Sperandio* v. *Clymer,* 563 S.W.2d 88, 90-91 (Mo.App. 1978):

> "As to the Count II claim asserted against Snead, it is further alleged that he, knowing that surgical intervention in Sperandio's hip joint would lay open to direct visual inspection the malpositioned fragments of his acetabulum, and reveal the extent of the damage which had occurred to his hip on the December 2,

1967, surgery, Snead joined in the conspiracy to conceal from Sperandio the condition of his hip and to prevent him from promptly receiving further remedial care which would reveal the true condition."

* * *

"[2] What is here alleged is that Snead joined a preexisting fraudulent purpose of knowingly concealing Sperandio's true condition from him, and knowing that planned surgery at UMMC would reveal the previous malpractice and its concealment, taking steps to prevent that surgery by affirmatively, overtly writing the letter of December 8, 1968, warning that Sperandio had litigation in mind, all to Sperandio's damage, as alleged. The allegations are for a conspiratorial, intentional tort sounding in fraud, although that fraud was originally practiced by Michael and Yancey, as alleged. It is said in 15A C.J.S. Conspiracy § 19, p. 659, 'To render a person civilly liable for injuries resulting from a conspiracy of which he was a member, it is not necessary that he should have joined the conspiracy at the time of its inception; every one who enters into such a common design is in law a party to every act previously or subsequently done by any of the others in pursuance of it, * * *.' See also 16 Am.Jur.2d, Conspiracy, § 48, p. 151."

In apparent justification of his disregard of Count II and its judicial construction, petitioner argues that his own exculpatory conclusions contained in his affidavit constitute the adjudicated facts and show that he was not a part of the fraudulent conspiracy of concealment (A 32):

"I did not at any time from September 14, 1967 to Feb., 1974 consult with or advise either Mr. Sperandio or Harvey R. Michael, M.D., Daniel L. Yancey, M.D., William H. Snead, M.D., D. E. Caywood or David A. Fardon, M.D. concerning Mr. Sperandio; the two letters, Exhibits B and C, constitute my sole contact."

In direct disputation appears the affidavit of counsel for Mr. Sperandio who attended the voluntary deposition given by petitioner on behalf of both Harvey R. Michael and Daniel L. Yancey on March 16, 1972, which is a date within the time (September 14, 1967 to Feb., 1974) during which petitioner averred that he did not advise Sperandio or Michael or Yancey of anything (A 39). Furthermore, excerpts from petitioner's deposition show clearly that he stated under oath that the surgery resulted in Sperandio's hip bones being "where they ought to be." (A 43).

For the failure of petitioner to accurately apprise this Court of the whole extent of his contacts with the State of Missouri, certiorari should be denied.

II.

Petitioner treats the practice of medicine and surgery as an unregulated business in Missouri. It is not. The State of Missouri has expressed its interest in the practice of medicine and surgery and regulates those who may so practice. The cases declaring the elements of minimum contacts in unregulated transactions which are relied upon by petitioner are not persuasive. Petitioner has failed to show that the opinion of the Supreme Court of Missouri is contrary to any decision of this Court or to any probable decision of this Court in the future. Certiorari should be denied.

Petitioner recognizes the authority of *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957) which in turn recognizes the efficacy of a state's legislated supervision of insurance contracts

within the State of California. A single, mailed insurance contact subjected the insurance company to the jurisdiction of the California courts.

But, petitioner fails to note or to point to the fact that Missouri similarly has legislated control of the practice of medicine and surgery in Missouri. Chapter 334, RSMo.

There is no doubt that if petitioner had stood in the Missouri surgical theater and given oral directions to the two Missouri-resident surgeons as he actually gave his written directions by mail from Utah, that the State of Missouri would have had an interest in his actions. Petitioner fails to distinguish the effect of his written directions for the mechanics of surgery to be performed upon a specific Missouri resident within Missouri from in-the-state oral directions which might have been given to the same effect.

Petitioner also suggests that he is insulated from responsibility because of a lack of privity with respondent. If that were so, then no consulting physician who might be solicited by a patient's treating physician for specific evaluation and advice would ever be accountable to a patient for medical negligence in consultation. Petitioner's suggestion is not supported by authority and is not valid.

Petitioner would equate his written directions and sketched plan for specific surgery to be performed upon a specific patient, prescribed and intended to correct a specific diagnosed condition within the State of Missouri with general advice which is commonly disseminated by medical treatises. His argument is not tenable. He did not write or sketch to a general principle; he diagnosed a specific patient's condition and recommended a specific, unique surgical procedure which he designed and platted for that specific patient for known execution within the State of Missouri (A 42): "A. That is the site of the

osteotomy which I recommended be made to release the Acetabulum."

Petitioner lays great emphasis upon the fact that respondent has not shown any agreement that petitioner should be compensated for his diagnostic and prescriptive services. For that reason, petitioner argues that he is immune to accountability for his negligence and torts. If that were so, any physician who donates services to a free clinic would be held immune from the consequences of his negligence in treating charity patients. There is no such law and petitioner points to none such.

Petitioner initially had no duty to assist the Missouri surgeons who were ignorant of his Pemberton Procedure. But, having undertaken to assist, having undertaken to assume the duty, he is accountable for his undertaking.

Missouri has a state interest in the surgery performed within Missouri and petitioner fails to demonstrate that he may direct surgery being performed within Missouri from without Missouri and yet remain immune to the jurisdiction of Missouri courts in adjusting the results of such surgery.

Certiorari should be denied.

III.

Missouri's jurisdiction over the person of petitioner must stand as absolute because of petitioner's voluntary general appearance in the case by his plea for a dismissal of the petition with prejudice. A plea for affirmative relief is a general appearance and waives any defect in personal jurisdiction. Certiorari should be denied.

By order entered March 7, 1975, original service of process upon petitioner Pemberton was quashed and he

stood beyond the pale of the Missouri trial court just as though he had not been served at all (A 9).

Thereafter, petitioner was served with alias summons on August 3, 1977 (A 2). His petition for certiorari speaks to the proceedings subsequent to the summons served upon him on August 3, 1977 which the Supreme Court of Missouri has held to be a valid service (A 1-5).

Although the Supreme Court of Missouri has held that Pemberton's contacts with the State of Missouri satisfy the federal requirements of minimum contacts (A 1-5), jurisdiction over Pemberton also must be sustained for the additional reason of his voluntary application to the Missouri trial court for affirmative relief, a voluntary submission of his person to the jurisdiction.

His Motion to Dismiss which he filed subsequent to the August 3, 1977 service carried the incantation of "special" appearance but he sought a dismissal *with prejudice* (A 53-54):

> "WHEREFORE, defendant Pemberton moves the Court for an order dismissing him from the case with prejudice."

Acting upon that motion, the trial court did grant affirmative relief by dismissing the case *with prejudice to its refiling* against Pemberton (A 10). It was a case-ending order of dismissal as to Pemberton, affirmatively sought and gained by Pemberton.

It is held under the procedural law of Missouri that a mere recital of "special appearance" is a meaningless vestigial remnant of ancient pleading practice in Missouri and that under post-1943 pleading practice, the *relief sought* governs the substance of the appearance. "Special

appearance" is called "ancient abracadaba" (sic). *State ex rel. Dennis* v. *Snodgrass*, 501 S.W.2d 553, 558 (Mo.App. 1973).

The mere fact that a non-resident by reason of lack of minimum contacts may be immune to service of process which requires him to appear and defend does not mean that he may not appear and defend *of his own choice.*

Pemberton sought *only* to have the case dismissed as to him. He did not seek to have the summons of August 3, 1977 quashed. He need not have stood upon the claimed lack of personal jurisdiction and he did not. He was free to waive it and he did. For the Missouri law on this point we cite *Greenwood* v. *Schnake*, 396 S.W.2d 723, 726 (Mo. 1965):

> "[1-3] Note well, however, that a defendant objecting to lack of jurisdiction over his person should *promptly* file the motion raising the question. Such a motion must be made within the time allowed for responding to the opposing party's pleading, Civil Rule 55.36; § 509.330, and if not made within the time therein limited the party waives all objections to jurisdiction then available to him, by the express provisions of Civil Rule 55.37 and § 509.340." Emphasis the court's.

It is clear that if the trial court did not have jurisdiction over the person of petitioner, it did not have jurisdiction to dispose of respondent's claim against petitioner finally by a dismissal with prejudice, the affirmative relief which the petitioner clearly sought (A 54) and the affirmative relief which the trial court just as clearly endeavored to grant (A 10).

If Federal Rule of Civil Procedure 12 is deemed to be controlling, still petitioner did not seek to have the

service of August 3, 1977 quashed; he sought *solely* the affirmative relief of a dismissal of the claim *with prejudice*, an affirmative claim-ending relief and thereby waived any objection to personal jurisdiction. Federal Rule 12(b), (g) and (h)(1).

Because petitioner Pemberton voluntarily *sought* and received the affirmative, case-ending relief of dismissal with prejudice rather than mere discharge for lack of personal jurisdiction, he waived any standing to complain of lack of personal jurisdiction and certiorari should be denied.

CONCLUSION

Certiorari should be denied under the terms of Supreme Court Rule 23(4) because petitioner did not state accurately the nature and extent of his contacts with the State of Missouri in his petition for certiorari. Certiorari should be denied because petitioner undertook to advise and counsel a specific surgery to be performed within the State of Missouri and brought himself within the scope of Missouri's state interest evidenced by regulatory legislation. Certiorari should be denied because the questions presented by the petition are moot; petitioner waived any standing to claim a lack of minimum contacts by voluntarily invoking the jurisdiction of the courts of Missouri in an attempt to secure a dismissal of respondent's claim with prejudice.

Respectfully submitted,

JOHN C. MILHOLLAND
Box A 302 East Pearl
Harrisonville, Missouri 64701
Telephone 816 884-3218
Attorney for Respondent